## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

- - -

AMGEN, INC., : CIVIL NO. 16-853

et al.,

Plaintiff :

:

v. : UNDER SEAL

:

: :

AMNEAL PHARMACEUTICALS, : Philadelphia, Pennsylvania

et al., : June 13, 2019

Defendant : 2:06 p.m.

- - -

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE MITCHELL S. GOLDBERG
UNITED STATES DISTRICT JUDGE

- - -

## APPEARANCES:

For the Plaintiff: JOHN MURNANE, ESQUIRE

Venable LLP

1201 N Market Street

Unit 1400

Wilmington, DE 19801

For the Defendant: D. CLAY HOLLOWAY, ESQUIRE

Kilpatrick Townsend

1100 Peachtree Street NE

Suite 2800

Atlanta, GA 30309

TK Transcribers 9 Dogwood Avenue Glassboro, NJ 08028 609 440 2177

Audio Operator: Stephen Sonnie Transcribed By: Michael T. Keating Proceedings recorded by electronic sound recording; transcript produced by computer-aided transcription service. 

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3
1
               (The following was heard in open court at
2
    2:06 p.m.)
3
              THE COURT: Hello.
4
              ALL: Good afternoon, Your Honor.
5
              THE COURT: Tentative response.
6
              ALL: Good afternoon, Your Honor.
7
              THE COURT: Have a seat. I have a lot of
8
    papers I need to organize, so just bear with me for a
9
    second.
10
              (Pause in proceedings.)
11
              THE COURT: Okay. This case, the
12
    controversy here involves two parties in a larger
13
    case, Amgen versus Amneal, but the parties here are
14
    Plaintiff Amgen and Sun. Who is here on behalf of
15
    Amgen?
16
              MR. BLUMENFELD: Good afternoon, Your
17
    Honor. Jack Blumenfeld from Morris Nichols, John
18
    Murnane from the Venable Firm --
19
              MR. MURNANE: Good afternoon, Your Honor.
20
              MR. BLUMENFELD: -- Josh Rothman from the
21
    Venable Firm.
              MR. ROTHMAN: Good afternoon.
22
23
              THE COURT: Nice to see you again. And
24
    just because I'm so bad on names, the two of you are
25
    going to argue, right? So spell your last names
```

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4
1
    again, please.
2
              MR. MURNANE: Murnane, -U-R-N-A-N-E.
3
              THE COURT: Great.
              MR. ROTHMAN: Rothman, R-O-T-H-M-A-N.
4
5
              THE COURT: Okay. Go ahead.
6
              MR. BLUMENFELD: Behind me, Eric Agovino
7
    from Amgen, A-G-O-V-I-N-O, James Tyminski from
8
    Venable, T-Y-M-I-N-S-K-I.
9
              THE COURT: Nice to see you.
10
              MR. BLUMENFELD: I'm glad I can do that.
11
              THE COURT: Yes.
12
              MR. BLUMENFELD: And behind them, Lisa
13
    Russo, who is from Venable and Lois Kwasigroch from
14
    Amgen.
15
              MS. KWASIGROCH: Good afternoon.
16
              THE COURT: I remember you. How are you?
17
              MR. BLUMENFELD: Thank you, Your Honor.
18
              THE COURT: All right, thank you. And who
19
    is here for Sun?
              MR. GATTUSO: Good afternoon, Your Honor.
20
21
    Dominic Gattuso from Heyman Enerio Gattuso --
22
              THE COURT: Spell it.
23
              MR. GATTUSO: I'm sorry, G-A-T-T-U-S-O.
24
              THE COURT: -- S-O. Go ahead.
25
              MR. GATTUSO: And I have with me Clay
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5
1
    Holloway --
2
              THE COURT: Mr. Holloway.
3
              MR. GATTUSO: -- from Kilpatrick Townsend.
4
              THE COURT: Okay.
5
              MR. GATTUSO: Thank you.
6
              THE COURT: Okay. So first thing before I
7
    forget is someone, I think you folks, want me to seal
8
    the courtroom I think. I don't -- I know some of the
9
    folks here. I don't know who those two people are,
10
    and this is just a summer clerk and --
11
              MR. HOLLOWAY: They're with Sun, Your
12
    Honor.
13
              THE COURT: -- this is the assigned law
14
    clerk. So there's -- I don't think there's anyone in
15
    the courtroom -- who are you, sir?
16
              MR. AUTEN: Your Honor, my name is Steve
17
    Auten.
18
              THE COURT: And you're with?
19
              MR. AUTEN: I'm not counsel for either Sun
20
    or Amgen.
              THE COURT: Okay. Sounds like you want to
21
22
    be cryptic on who you're with or --
23
              MR. AUTEN: Well, I don't represent nobody
24
    active in the case, but I do represent Alkem
25
    Laboratories in the settle -- with respect to the
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```
6
1
    settlement on the same product.
2
              THE COURT: Settlement on the same product.
3
    But you're not -- you're not with a party in the
4
    case, you're just --
5
              MR. AUTEN: That's correct, Your Honor.
6
              THE COURT: All right. So we should
7
    discuss -- I don't know how we do it with him in the
8
    courtroom, but we should --
9
              MR. HOLLOWAY: Well --
10
              THE COURT: -- discuss whether we have to
11
    seal the courtroom, right?
12
              MR. HOLLOWAY: This is --
13
              THE COURT: Do you want to press that
14
    point?
15
              MR. HOLLOWAY: I mean I -- my only -- my
16
    only statement, Your Honor, is the parties entered
17
    into a confidential settlement agreement. You can
18
    tell from what we agreed to and redacted --
19
              THE COURT: I just want to know do you want
20
    to press the point? Do you want the courtroom
21
    sealed?
22
              MR. HOLLOWAY: That would be our request,
23
    Your Honor, yes.
24
              THE COURT: Okay. So I'm sure everyone
25
    just read -- and I think it's Third Circuit case law
```

7 1 would apply on sealing issues in a patent case, but 2 maybe the Federal Circuit case law applies if someone 3 has a different view. But if it's Third Circuit, 4 there's a very recent Third Circuit case that just 5 came out that really spells out clearly 6 confidentiality and sealing. So to the extent that 7 you agree Third Circuit case law applies to the 8 sealing issue, do you? 9 MR. HOLLOWAY: We do, Your Honor. 10 THE COURT: Okay. So that's the Avandia 11 case and it's a very clear pronouncement, I think a 12 continuation of what Panzy (ph) said, which is the 13 presumption is public access, very strong 14 presumption, and statements like -- and I'm going to 15 give you a chance to expand, but statements like, 16 "Well, the parties entered into a confidentiality 17 agreement," are not sufficient. I mean you're -- if 18 you're moving, you're going to have to -- it's your 19 burden to prove harm if we keep the courtroom open. 20 So saying we entered into a confidentiality agreement 21 is not even close, in my judgment, to meeting that 22 burden. So I mean sort of -- it's going to be 23 difficult to discuss it while the public is still in 24 the room. Can you articulate the harm without 25 causing the harm?

```
8
1
              MR. HOLLOWAY: Your Honor, we're actually
2
    find just going forward.
3
              THE COURT: Okay.
4
              MR. HOLLOWAY: We can withdraw -- we can
5
    withdraw the request or you can just rule against it
6
    so we don't --
7
              THE COURT: Well, I mean it's not an
8
    either/or. I'm happy -- I'm happy to -- I'm not
9
    broadcasting to you that I disagree with you. I'm
10
    just saying we have a Third Circuit standard that I'm
11
    going to have to comply with. I'm happy to talk it
12
    through, figure out a way to talk it through, if you
13
    want the courtroom sealed. So it's your decision.
14
    What do you want to do?
15
              MR. HOLLOWAY: The --
16
              THE COURT: Do you want to press that point
17
    or not?
18
              MR. HOLLOWAY: The harm to us, Your Honor,
19
    to Sun --
20
              THE COURT: Do you want to press that point
21
    or not?
              MR. HOLLOWAY: I would just -- yes, I'm
22
23
    going to make one position on this.
24
              THE COURT: Okay.
              MR. HOLLOWAY: We are competitors with the
25
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```
9
1
    gentleman who is here.
2
              THE COURT: (Indiscernible).
3
              MR. HOLLOWAY: And we don't know what their
4
    settlement agreement looks like.
5
              THE COURT: Okay.
6
              MR. HOLLOWAY: We know what our settlement
7
    agreement looks like and we know the implications to
8
    Sun depending on how Your Honor rules on our motion
9
    and the case that we've brought.
10
              THE COURT: Yes.
11
              MR. HOLLOWAY: There is a competitive
12
    disadvantage to Sun in terms of us going to market
13
    and what we want out of our motion to the extent that
14
    others would try to read into what we're doing and
15
    follow in similar suit. So --
16
              THE COURT: And that's the harm that
17
    you're -- you think meets your burden under the
18
    Avandia case, is that correct?
19
              MR. HOLLOWAY: That would be our only
20
    argument other than the parties entered into a
21
    confidentiality agreement, Your Honor.
22
              THE COURT: Well, it's an argument with I
23
    think the needed substance. So you've made that
24
    argument, so yes, you're pressing your request to
25
    seal the courtroom or not?
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```
10
1
              MR. HOLLOWAY: Yes, Your Honor.
2
              THE COURT: Yes. Okay. Does anyone else
3
    want to be heard, including -- I'll hear what you
4
    have to say.
5
              MR. AUTEN: Yes, Your Honor, Mr. Auten, A-
6
              I don't think there's any confidentiality
7
    concerns here whatsoever because of the agreements in
8
    this case, of which my client has its own. All the
9
    terms are substantially similar, so to the extent
10
    that --
11
              THE COURT: Well, how do you know? Do you
12
    have the agreement in this case?
13
              MR. AUTEN: No, I've been involved in these
14
    cases long enough that the brand controls the
15
    drafting of the settlement agreement, and most of the
16
    agreements, they file that template and they're all
17
    going to contain substantially the same language.
18
              THE COURT: Well, you don't know what this
19
    says.
20
              MR. AUTEN: I --
21
              THE COURT: You don't know what the --
22
    we're here to discuss --
23
              MR. AUTEN: I obviously do not know --
24
              THE COURT: -- a settlement agreement, and
25
    you don't know what the settlement agreement says.
```

```
11
1
              MR. AUTEN: No, of course I don't know
2
    that.
3
              THE COURT: Yes. Okay.
4
              MR. AUTEN: I have not seen the agreement
5
    per se.
6
              THE COURT:
                          Okay.
7
              MR. AUTEN: The best I -- the best I know
8
    it -- I can offer is that the brand offers the
    template up in negotiations and carries it through
9
10
    (indiscernible) with each defendant. And we've also
11
    seen from the Teva case that's been published mostly
12
    in the record already with the dispute involving
13
    Teva.
14
              THE COURT: Okay. Okay. I'm inclined to
15
    seal the courtroom because I think that under
16
    Avandia, Sun makes out their burden to establish harm
17
    in that they've articulated that the outcome of my
18
    ruling here could allow competitors to know when they
19
    may launch, and that could cause them harm, which I
20
    believe is enough under the Avandia case. But if
21
    you -- if you disagree -- I mean if you disagree and
22
    you want to press the point, then we got to talk
23
    about well, you know, maybe we have to litigate the
24
    sealing, you know, because there's a -- there's a
25
    party of interest from the public who wants to stay
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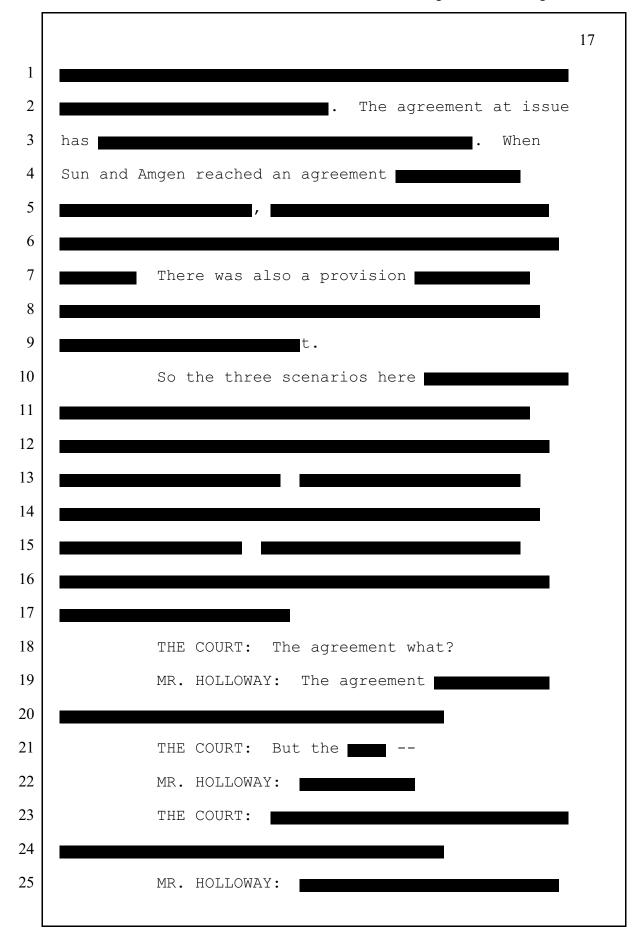
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12
1
    in the courtroom. And I'm reticent to kick anyone
2
    out of a public courtroom.
3
              MR. AUTEN: Your Honor, I do want to press
4
    the point. We already have notice that they have an
5
    intent to launch the product. They just have an
6
    agreement -- they have a disagreement with Amgen in
7
    terms of the meaning of that agreement on whether
8
    they can do that. It's very clear in their papers
9
    that Sun believes it has a right to launch this
10
    product. And, in fact, under the terms of their
11
    agreement, we were provided notice that Sun gave to
12
    Amgen of its intent to launch the product. So --
13
              THE COURT: Yes, so -- but you're not a
14
    party in this case?
15
              MR. AUTEN:
                          We were at one point. My
16
    client has settled -- has the same -- has the
17
    settlement agreement --
18
              THE COURT: Were you --
19
              MR. AUTEN: -- with Amgen.
20
              THE COURT: Who is your client again?
21
              MR. AUTEN: Alkem, A-L-K-E-M, Alkem
22
    Laboratories.
23
              THE COURT: And Alkem was -- remembering
24
    this was Judge Sleet's case originally, so my memory
25
    is not so great as to who originally came into this
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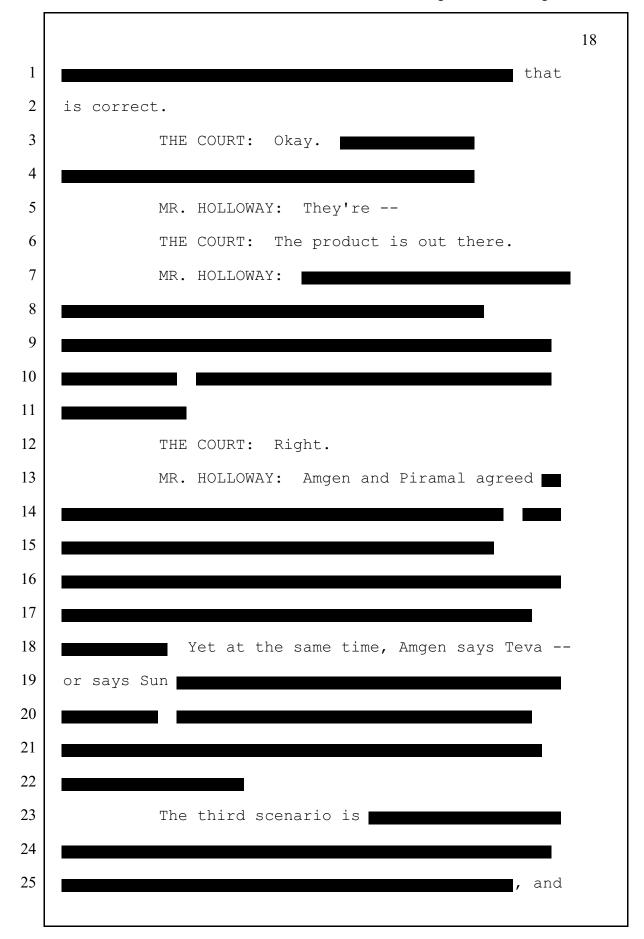
```
13
1
           I walked into it in the middle of a trial or
2
    right before a trial. So Alkem was an original
3
    defendant when the case was filed, is that right?
                                                        Is
4
    that right?
5
              MR. MURNANE: Yes, Your Honor.
6
              THE COURT: You're the plaintiff. They
7
    were?
8
              MR. MURNANE: Yes.
9
              THE COURT: Okay. Okay. So would it --
10
    and what's your last name again, sir?
11
              MR. AUTEN: It's A-U-T-E-N.
12
              THE COURT: A-U-T --
13
              MR. AUTEN: Echo, November.
14
              THE COURT: A-U-T --
15
              MR. AUTEN: E-N.
16
              THE COURT: E-M, as in Mitch?
17
              MR. AUTEN: No, Echo and November.
18
              THE COURT: Echo, November. Okay. Do you
19
    think your rights to access would be preserved if I
20
    were to say I do think they've made out their burden
21
    under Avandia, but I'll provisionally seal the
22
    transcript here and, of course, entertain your motion
23
    to have me unseal it so you would have access? Would
24
    that be satisfactory to you?
25
              MR. AUTEN: Well, I'd certainly would like
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14
1
    to attend today's hearing. That's my objective
2
    today.
3
              THE COURT: Attend what?
4
              MR. AUTEN:
                          The hearing today. I'd like --
5
              THE COURT: Yes.
6
              MR. AUTEN: In person.
7
              THE COURT: Okay.
8
              MR. AUTEN: I don't -- I took by your
9
    statement that you were going to seal the courtroom
10
    and then provisionally allow me access to the
11
    transcript.
12
              THE COURT: Yes, but I would add -- yes,
13
    provisionally allow you access if you could convince
14
    me that my ruling was in error and I provide you with
15
    an opportunity to do that. So seal the courtroom,
16
    transcript is under seal, you can file a motion with
17
    me, tell me that I'm wrong and it shouldn't have been
18
    sealed, and if I agree with you -- this way you get
19
    your due process -- and if I agree with you, I'll
20
    unseal and I'll hear from Sun in a more detailed
21
    fashion. I'm just trying to be practical because
22
    everyone is here and I want to go forward with the
23
    hearing, and --
24
              MR. AUTEN: Right.
              THE COURT: -- I think -- I think that that
25
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```
15
1
    preserves -- I'm asking you do you believe that that
2
    preserves your client's rights to seek access to
3
    what's going to go on here?
4
              MR. AUTEN: Yes.
5
              THE COURT: You're good with that? Okay.
6
    Then the courtroom is sealed. I'm going to
7
    respectfully ask you to leave. And why don't -- you
8
    know, file whenever -- I'm going to file the
9
    transcript under seal, and file whatever motion you
10
    want to file. Whenever you file it, we'll get their
11
    response, and if you're right and my initial ruling
12
    is wrong, then you'll get access to the transcript,
13
    okay?
14
              MR. AUTEN:
                          Thank you, Your Honor.
15
              THE COURT: All right, thank you.
16
              (Pause in proceedings.)
              THE COURT: Mr. Sonnie asked if I wanted
17
18
    him to lock the courtroom. Chain it, padlock it.
19
    Thank you. Okay, I think we're good. All right, so
20
    that takes care of that issue.
21
              I think there are two issues here, but I
22
    want to -- and they both come under the provisions of
23
    the settlement agreement. But I have some
24
    preliminary questions I want to get answered. Very
25
    preliminary, and I couldn't find it -- I probably
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16
    missed it three times -- when does the 504 patent
1
2
    expire? I'm sorry, 405. It's 405, right?
3
              (Pause in proceedings.)
4
              THE COURT: See, now I don't feel so bad.
5
    Everyone is scrambling to find the answer.
6
              MR. MURNANE: It's the fall of 2026, Your
7
    Honor.
8
              THE COURT: Fall of 2026, okay. All right.
9
    Well, this is Sun's motion, right?
10
              MR. HOLLOWAY: Yes, Your Honor.
11
              THE COURT: So I have a bunch of questions.
12
    Why don't you just step to the podium and make your
13
    argument? And counsel who have appeared before me
14
    before know I'll most likely interrupt you when
15
    questions pop into my head, and apologies in advance
16
    for those interruptions.
17
              MR. HOLLOWAY: And, Your Honor, I have just
18
    paper copies that are excerpts to various provisions.
19
              THE COURT: Yes.
20
              MR. HOLLOWAY: It might be easier than
21
    flipping constantly.
22
              THE COURT: Yes, thank you.
23
              (Pause in proceedings.)
24
              MR. HOLLOWAY: So I'm going to just start
25
    on what is slide 2 of the second page. So there are
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19
1
    that's one of the major bases for the discovery we
2
    asked for, which is an ancillary part of today's
3
    hearing.
4
              So going to the next slide --
5
              THE COURT: Wouldn't it -- wouldn't it --
6
    in your view, wouldn't it make more sense if I do
7
    decide to interpret the contract -- and I understand
8
    there's a case or controversy issue out there. But
9
    if I do decide to interpret the contract, why
10
    wouldn't it make more sense to do that and then
11
    decide whether to allow discovery, as opposed to
12
    simultaneous?
13
              MR. HOLLOWAY: So if I understand Your
14
    Honor's question, would it -- would it make more
15
    sense to decide whether Sun's theory has merit before
    we get to discovery?
16
17
              THE COURT: Yes.
18
              MR. HOLLOWAY: Okay. That's my
19
    understanding of what we're doing today at the
20
    hearing.
21
              THE COURT: Okay.
22
              MR. HOLLOWAY: So if you decide there's no
23
    merit, then that conversation might be shorter. If
24
    you decide there is merit, the conversation might be
25
    even shorter.
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20
1
              THE COURT: Okay.
2
              MR. HOLLOWAY: So turning to the next
3
    slide, this is -- you mentioned the case or
4
    controversy issue, Your Honor. This is where we know
5
    there is one. Amgen and Teva agreed that Teva
6
    wouldn't sell the product anymore. They also entered
7
    into an agreement with Teva
8
9
10
11
12
13
14
15
              We confirmed this when we called them
16
    shortly before filing the instant motion and said
17
18
    There is plenty of federal circuit law out there that
19
    says that
20
21
              THE COURT: What's your best case for that
22
    proposition?
23
              MR. HOLLOWAY: That would be the Sandis
24
    case, Your Honor. We cite it in our briefs at 480
25
    F.3d 1372. And so -- and the fact that this Court
```

```
21
1
    has jurisdiction is undisputed. Its order in this
2
    case specifically gave this Court retention and
3
    jurisdiction over the enforcement of the agreement.
4
    Amgen cites a case in its brief called the Henderson
5
    case.
6
              THE COURT: Well, let me -- before we get
7
    to that --
8
              MR. HOLLOWAY: Uh-huh.
9
              THE COURT: -- what am I enforcing? The
10
    terms of the order that I guess Judge Sleet -- yes,
11
    Judge Sleet signed says, "The Court retains
12
    jurisdiction over plaintiffs and defendants for
13
    purposes of enforcing the terms." So tell me
14
    precisely what I would be enforcing if I agree with
15
    your position.
16
              MR. HOLLOWAY:
17
18
19
                                            That's what
20
    we're enforcing.
21
              THE COURT: And why is it -- so I'm
22
23
              MR. HOLLOWAY: Absolutely. You're
24
                             And --
25
              THE COURT: And why would -- why would --
```

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22
1
    just to sort of understand your thinking, why
2
    wouldn't a more proper way for me to do this would
3
4
5
6
7
8
9
10
              MR. HOLLOWAY: So that's a rightness
11
    question as opposed to a jurisdictional question.
12
    The justiciability doctrine of rightness is a
13
    balancing test. And as we cited in our brief, the
14
    Energy Partners case, when the interest in postponing
15
    review, which is what Amgen would suggest until the
16
    question arises in a more concrete fashion in final
17
    form, is outweighed by the immediate and practical
18
    impact on the party seeking relief.
19
20
21
22
23
                                           It's the same
24
    dispute. Your Honor is going to have to deal with
25
    the same issue. This is the more judicially
```

```
23
1
    economical way to handle it. Let's do it now and
2
    that way we don't have to -- |
3
4
5
6
              THE COURT: And it's -- any time you say
7
    judicial economy, a judge always, you know, listens,
8
    but I could -- I could argue back with you and say
    well, people come to -- people have problems that
9
10
    aren't in a courtroom all the time. Judges can't
    just, you know, step in and resolve them --
11
12
              MR. HOLLOWAY: So that's why --
13
              THE COURT:
14
             right?
15
              MR. HOLLOWAY: Well, fair enough, but
16
    that's why there's a difference between the idea that
17
    this Court and Your Honor has jurisdiction to deal
    with the issue --
18
19
              THE COURT: Yes, you've already -- you're
20
    already in a lawsuit. You just settled it.
21
              MR. HOLLOWAY: And then the question is
22
    whether or not the issue is currently ripe. And I
23
    would suggest that the conversation Your Honor and I
24
    are having is a ripeness question.
```

THE COURT: Yes.

25

24

1 MR. HOLLOWAY: And that is squarely within your discretion. Do I feel like I can better handle 2 3 the dispute now or 4 And I would proffer that we can 5 better handle it now | 6 7 THE COURT: Would you mind arguing from 8 counsel table because I think I want to go back and 9 forth and ask --10 MR. HOLLOWAY: Yeah, that's fine, Your 11 Honor. 12 THE COURT: -- Mr. Murnane a question, and 13 I'll come back to you. But they've already -- I mean we're in a lawsuit. You settled with them. And you 14 15 asked Judge Sleet to sign, and he did sign, a 16 provision that says, "The Court retains jurisdiction 17 for purposes of enforcing the terms of the settlement 18 agreement." 19 20 21 MR. MURNANE: The Court does retain 22 23 jurisdiction, Your Honor, for a case or controversy, 24 and he --25 THE COURT: Well, it doesn't say that.

```
25
1
              MR. MURNANE: Well, I'm --
2
              THE COURT: It says "for purposes of
3
    enforcing the terms of the settlement agreement."
4
              MR. MURNANE: Yeah, and if we were truly
5
    enforcing the terms of the settlement, there would be
6
    a case or controversy, but we're not. That's our
7
    position, Your Honor.
8
              THE COURT: Why not?
9
              MR. MURNANE: Because, if I may, Judge
10
    Stark has already ruled on some of these issues in
11
    the Sipla (ph) case and --
12
              THE COURT: Is that the antitrust case?
13
              MR. MURNANE: Well, that and -- it's
14
    antitrust and it's also the agreement, the Sipla
15
    agreement, between Amgen and Sipla, okay?
16
              THE COURT: Do I need the -- I saw that
17
    opinion and I read some of it. And do I need to
18
    understand that opinion --
19
              MR. MURNANE: No, no, I'm --
20
              THE COURT: -- to rule in this case?
21
              MR. MURNANE: No, Your Honor, we'll talk
22
    about that.
23
              THE COURT: Okay.
24
              MR. MURNANE: But we -- I mention it
25
    because counsel told us two days ago that they intend
```

26

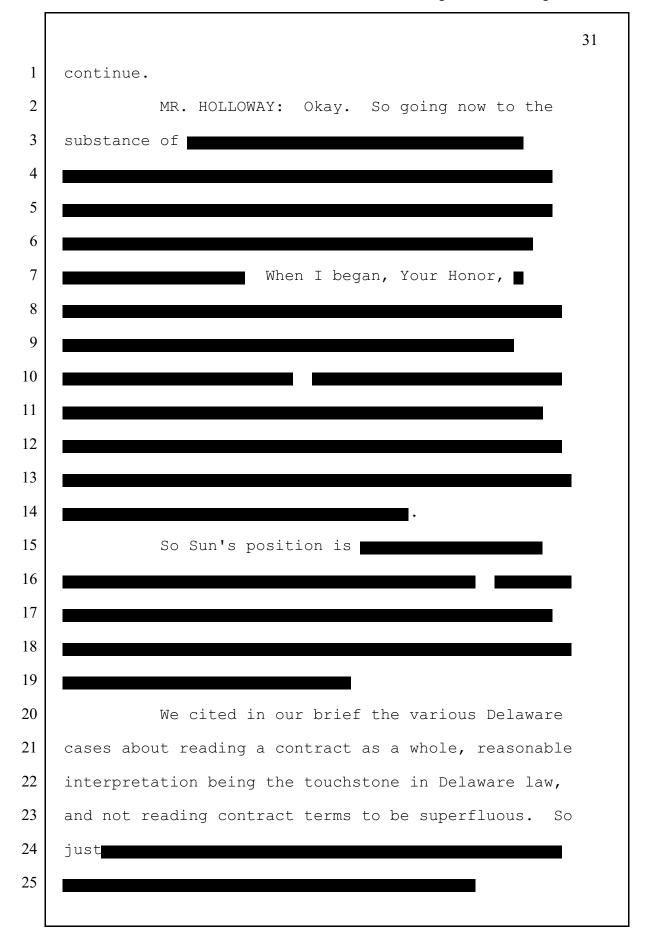
1 to bring aspects of that case before Your Honor, so 2 I'm bringing it up. But as he noted there on page 8 3 of his May  $2^{nd}$  opinion there, for -- if this is a 4 breach of contract, if they're saying it is a breach 5 of contract here, the law he cites, the VLIW Tech 6 case here for Delaware law, so you have an existence 7 of a contract, number one. We have that. Then for 8 two, the breach of an obligation imposed by the 9 contract. We haven't breached any obligation imposed 10 by the contract. And three, resulting damage to the 11 plaintiff. 12 So there are three elements, and the second 13 one, there is no obligation that we breached. The 14 contract terms are clear. We didn't breach any 15 obligation, Your Honor. 16 THE COURT: 17 18 19 20 THE COURT: Right? 21 MR. HOLLOWAY: 22 23 THE COURT: You're threatening him with a 24 breach. MR. MURNANE: Your Honor, they haven't said 25

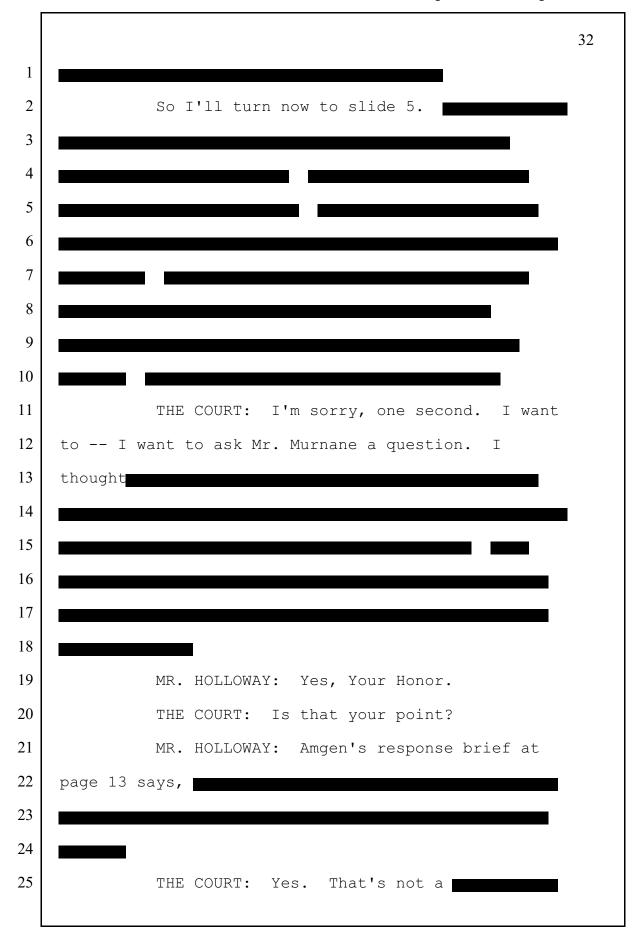
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27
1
    to us -- although we heard what Mr. Auten said,
2
3
4
               We have not heard that. We have
5
    not heard
6
7
              THE COURT: Why -- pronounce your last name
8
    for me.
9
              MR. HOLLOWAY: Holloway.
10
              THE COURT: Why then did Mr. Holloway
11
12
              MR. MURNANE: He --
13
              THE COURT:
14
15
              MR. MURNANE: He articulated and noted
16
17
18
19
20
21
              THE COURT: Yes.
22
              MR. MURNANE:
23
24
25
```

```
28
1
              THE COURT: Understood. Are you ready to
2
    launch?
3
              MR. HOLLOWAY:
                             ____, Your Honor.
4
5
               THE COURT:
6
7
              MR. HOLLOWAY: One second, Your Honor.
8
              THE COURT: Sure, yes.
9
               (Pause in proceedings.)
10
              MR. HOLLOWAY:
11
12
13
14
15
              MR. HOLLOWAY:
16
17
              THE COURT:
18
19
              MR. HOLLOWAY:
20
              THE COURT: I think someone behind you
21
    wants to talk to you.
22
               (Pause in proceedings.)
23
              MR. HOLLOWAY: Okay.
24
25
```

```
29
1
              THE COURT: This is so entertaining. I
2
    keep saying -- I keep saying
3
    and you keep coming back with a different way to say
4
    it.
5
              MR. HOLLOWAY: Yeah, I would say -- the way
6
    I would put it, Your Honor,
7
8
              THE COURT: , right?
9
              MR. HOLLOWAY:
10
              THE COURT: Okay. I quess I'm missing why
11
    we're -- why you're dancing around the question a
12
    little bit.
13
              MR. HOLLOWAY: Well, the fact of the matter
14
15
16
              THE COURT: Right.
17
              MR. HOLLOWAY:
18
19
              THE COURT: Of course.
20
              MR. HOLLOWAY:
21
              THE COURT: Of course. Of course. Okay.
22
          And the case you were citing from was the
    Okay.
23
    Sipla case that Judge Stark just authored where you
24
    said -- your point was, Mr. Murnane, it was there has
25
    to be some breach, and there has been no breach.
```

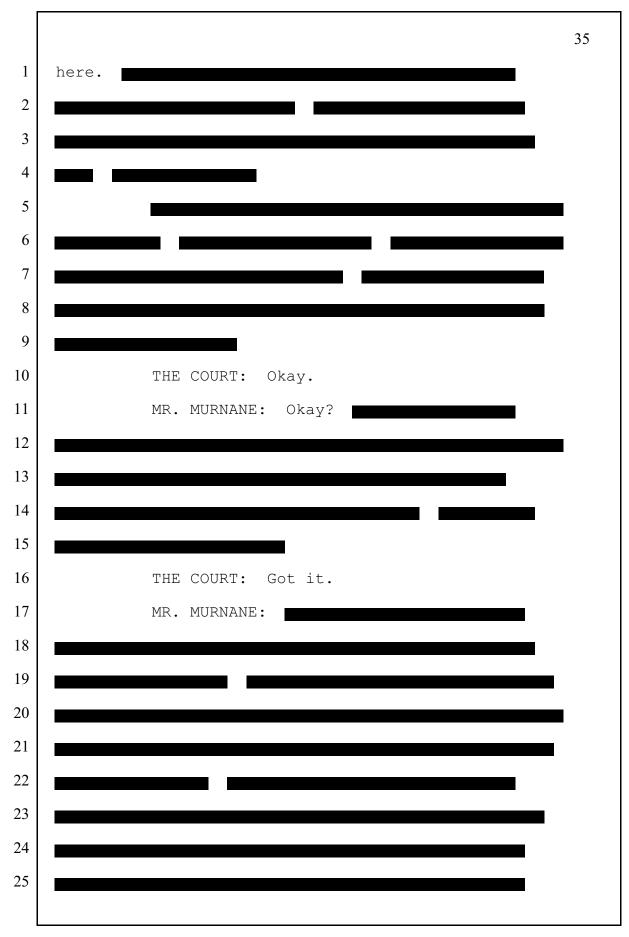
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30
1
              MR. MURNANE: Correct, Your Honor. As
2
    we've just heard -- we're just hearing now details
3
    about this, we --
4
              THE COURT: Right.
5
              MR. MURNANE: -- couldn't have
6
7
              THE COURT: Right.
8
              MR. MURNANE:
9
              THE COURT: Okay. And do -- could you --
10
    just for our benefit when we go back and look at
11
    this, could you give us a cite to the Judge Stark
12
    recent case in Sipla so we can find it quick?
13
              MR. MURNANE: He cited VLIW Tech, LLC
14
    versus Hewlett-Packard Co., 840 Atlantic 2d 606 612
15
    Delaware 2003.
16
              THE COURT: It's a case Judge Stark relied
17
    on?
18
              MR. MURNANE: Yes.
19
              THE COURT: Not the -- not the case he
20
    authored?
21
              MR. MURNANE: Correct, Your Honor.
22
              THE COURT: Got it.
23
              MR. MURNANE: He relied on it for those
24
    three principles that I articulated.
25
              THE COURT: Understood. Okay. All right,
```



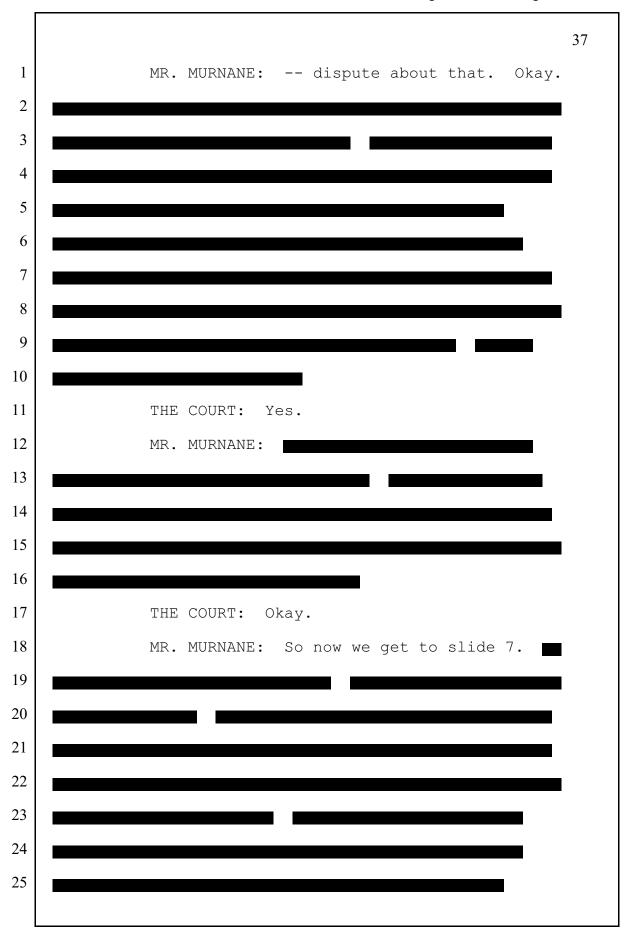


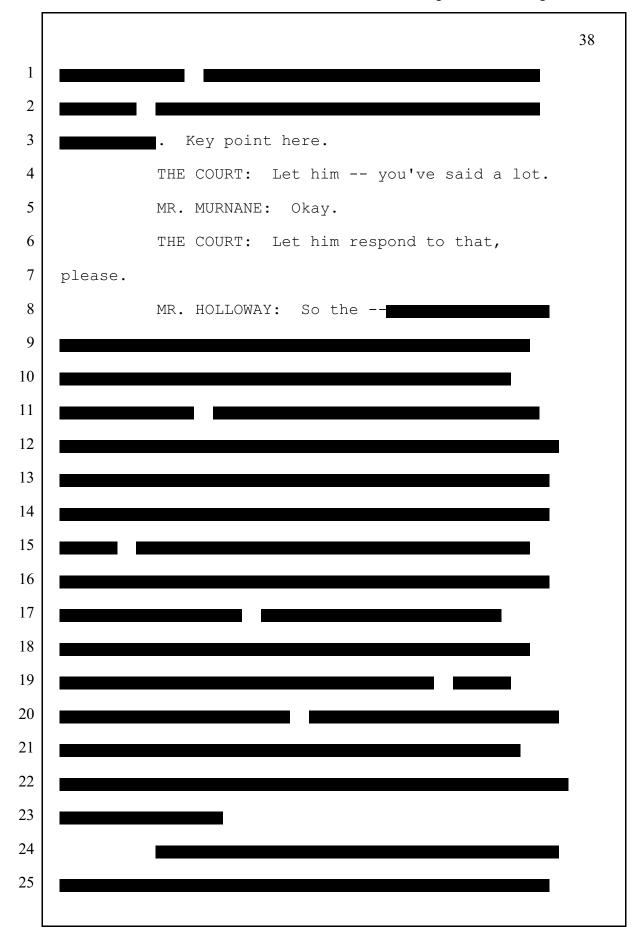
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33
1
                         So let's ask Mr. Murnane
2
    what his view is on that.
3
              MR. MURNANE: Your Honor, the point that
4
    counsel made
5
6
7
8
9
              THE COURT: All right. And what's your
10
    support for that, for --
11
              MR. MURNANE:
12
              THE COURT: -- what you just said?
13
              MR. MURNANE:
14
              THE COURT: What part?
15
              MR. MURNANE: Okay. Okay. Your Honor, if
16
    I -- if I -- would it be helpful if we gave you our
17
    slides, Your Honor, so you could look at them while
18
    we're --
19
              THE COURT: Whatever you --
20
              MR. MURNANE: Okay.
21
              THE COURT: -- want to give me to --
              MR. MURNANE: Thank you.
22
23
              THE COURT: I just --
24
              MR. MURNANE: And would Your Honor -- would
25
    Your Honor need another copy of the agreement?
```

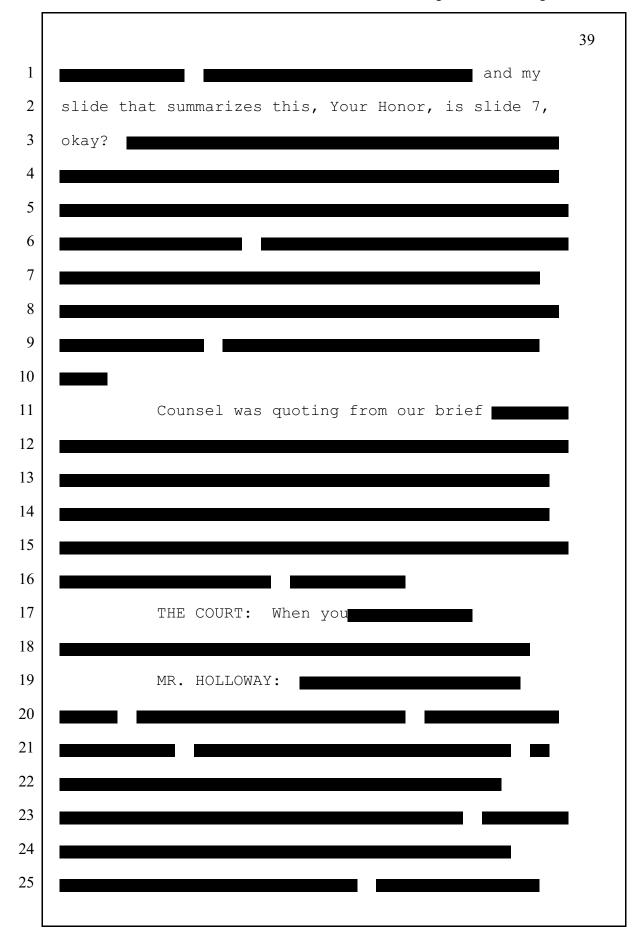
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34
1
              THE COURT: No, I have --
2
              MR. MURNANE: Okay.
3
              THE COURT: -- a copy.
4
              MR. MURNANE: Okay.
5
              THE COURT: For the last point, which
    (indiscernible), I just wanted to know what your
6
7
    support was in the agreement.
8
              MR. MURNANE: Okay.
9
              THE COURT: Where is it?
10
              MR. MURNANE: And I think if you have the
11
    slides, Your Honor --
12
              THE COURT: I do.
13
              MR. MURNANE: -- it will be very easy.
14
              THE COURT: Go ahead.
15
              MR. MURNANE: Okay. So if we take a look
16
    at our slide number 3, Your Honor --
17
              THE COURT: Okay, I'm there.
18
              MR. MURNANE:
19
20
21
              THE COURT: Yes.
22
              MR. MURNANE:
23
24
              THE COURT: Yes.
25
              MR. MURNANE: That's not in controversy
```



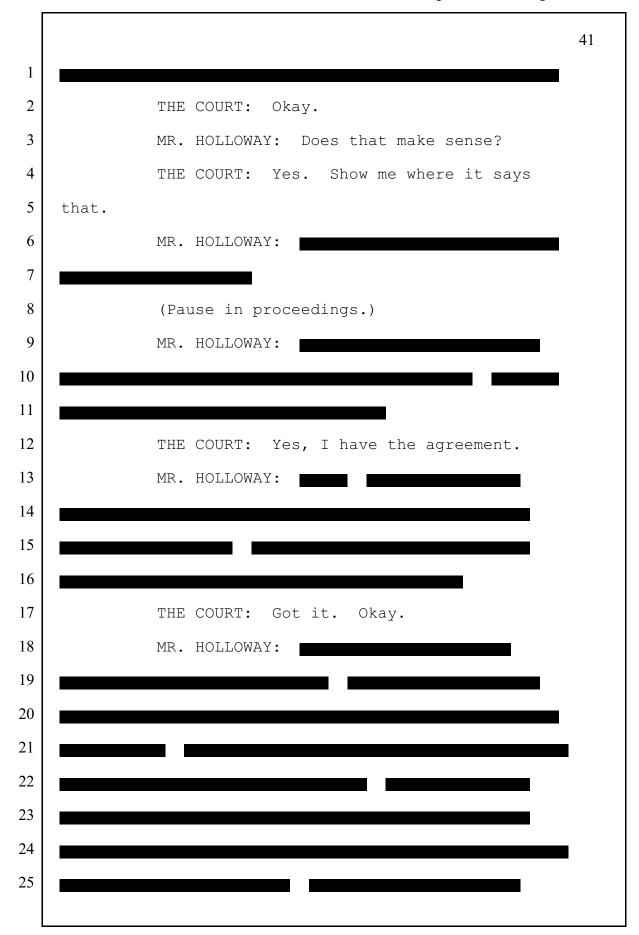
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36
1
2
3
4
5
6
                                  If we go to the next
7
    slide, slide 6 --
8
              THE COURT: Can you hold that thought for a
9
    second?
10
              MR. MURNANE: Yes.
11
              THE COURT: Because I want to confirm
12
    something you just said which I'm not --
13
              MR. MURNANE: Uh-huh.
14
              THE COURT: Is it generally accepted, what
15
    you just said,
16
17
18
19
20
              MR. MURNANE: And -- yes, Your Honor, and
21
    it's --
22
              THE COURT: Okay.
23
              MR. MURNANE:
24
                                         There's no --
25
               THE COURT: All right, go ahead.
```

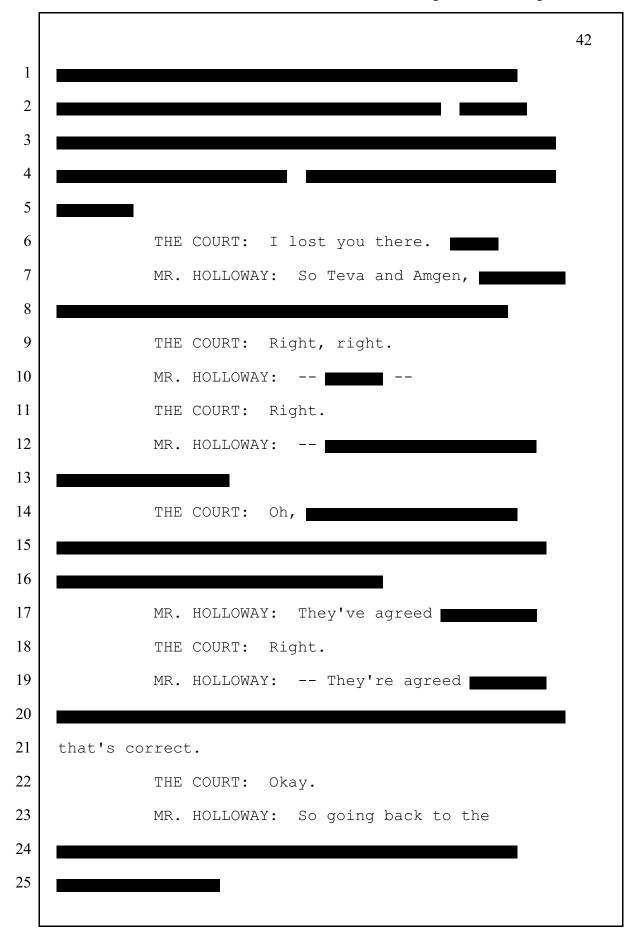


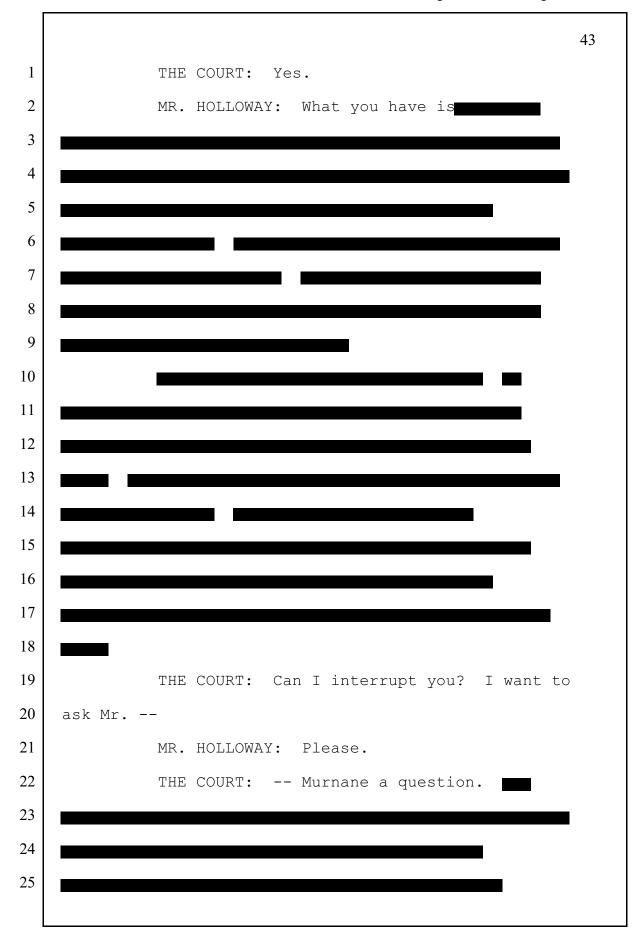


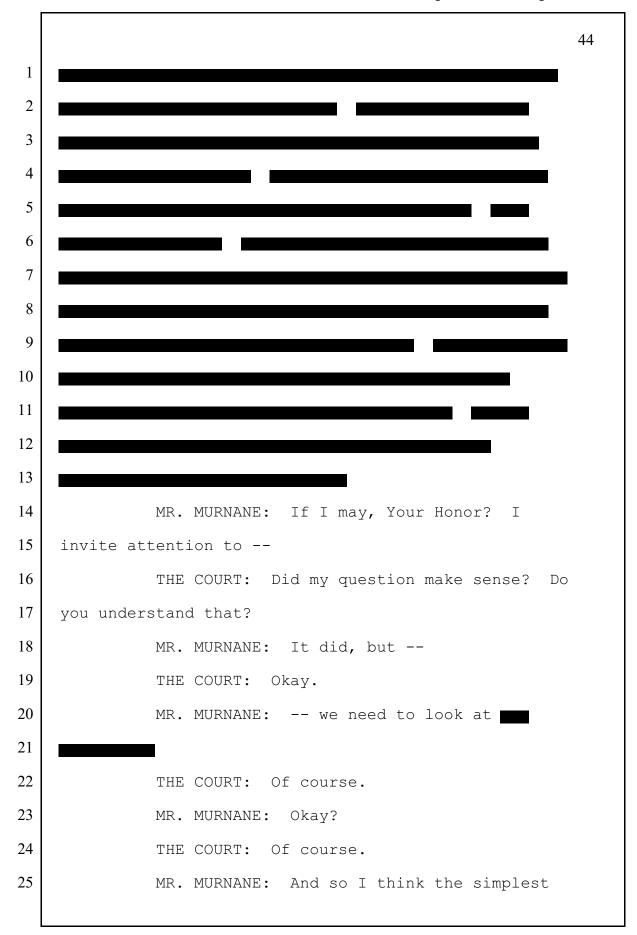


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40
1
2
              THE COURT: I'm -- you're ahead of me a
3
    little bit.
4
              MR. HOLLOWAY: Sorry.
5
              THE COURT: So
6
7
8
9
10
              MR. HOLLOWAY:
11
12
              THE COURT: -- because it's on appeal?
13
              MR. HOLLOWAY: Yes.
14
              THE COURT: Did I get that right?
15
              MR. HOLLOWAY: Yes, Amgen sought appeal.
16
    Teva had not prevailed --
17
              THE COURT: Right.
18
              MR. HOLLOWAY: -- at the Federal Circuit on
19
    that yet.
20
              THE COURT: So because it's on appeal, even
21
    though they won in the district court,
22
23
              MR. HOLLOWAY: I -- the way I would word
24
    it, Your Honor, is
25
```

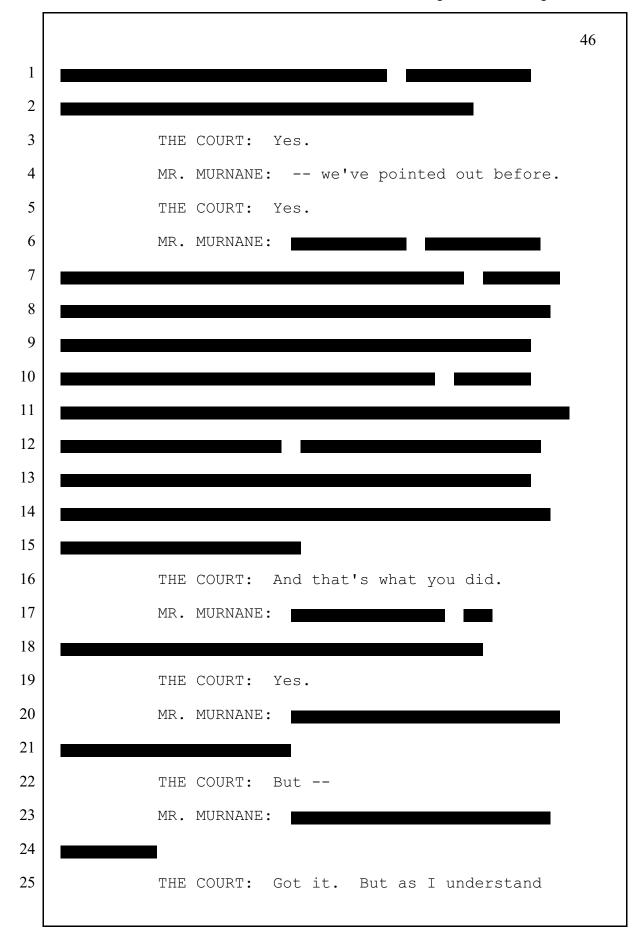


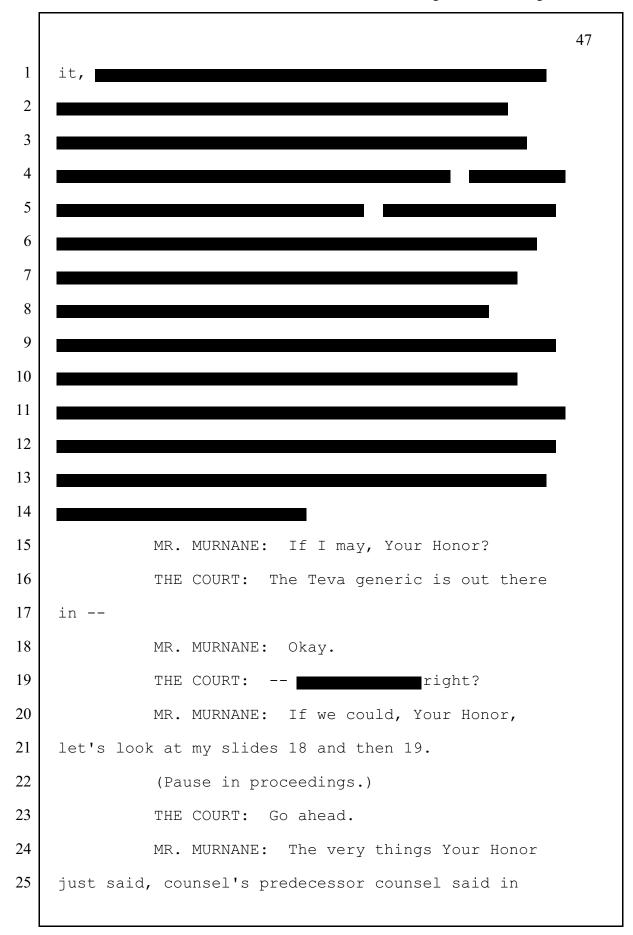


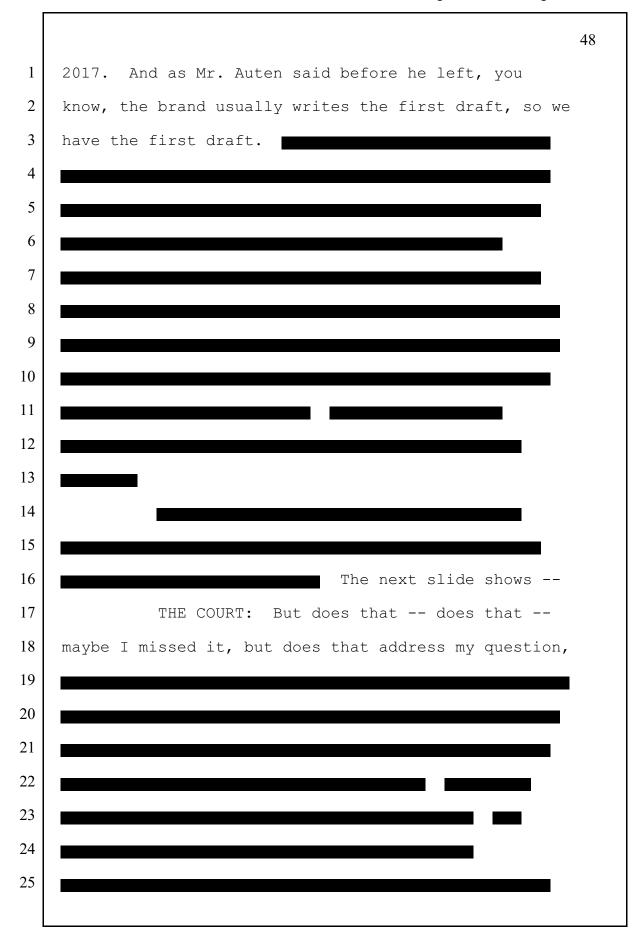




```
45
1
    thing to do would be, if we could, look at slide 16
2
    in Amgen's deck of slides.
3
              THE COURT: Okay. Go ahead, I'm there.
4
              MR. MURNANE: Okay.
5
6
7
8
9
10
              THE COURT: It will help me follow you if I
11
    just read it again, so just bear with me.
12
              MR. MURNANE:
                            Okay.
13
              THE COURT: I want to read it again and --
14
              MR. MURNANE: Okay.
15
              THE COURT: -- better understand what
16
    you're going to say.
17
              MR. MURNANE: Thank you, Your Honor.
18
              THE COURT: Just bear with me.
19
              (Pause in proceedings.)
20
              THE COURT: Go ahead.
21
              MR. MURNANE: Okay. And that continues on
22
    to slide 17. But the key language for us now here,
23
    Your Honor, is --
24
              THE COURT: Yes.
25
              MR. MURNANE:
```



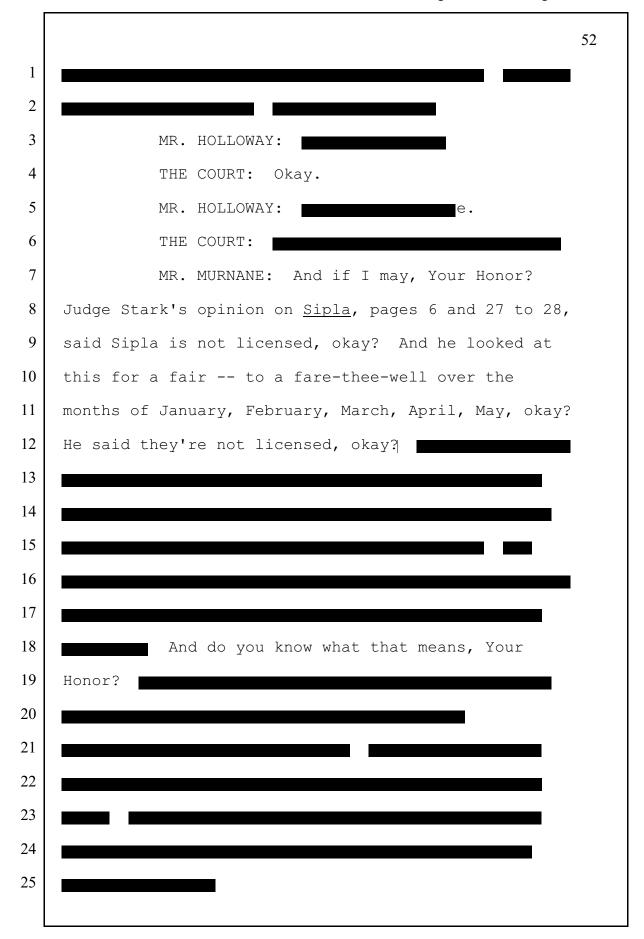




```
49
1
2
              MR. MURNANE: They said it was and they
3
    said to avoid that harm --
4
              THE COURT: Yes.
5
              MR. MURNANE:
6
7
8
              THE COURT: Yes, how is that possible?
9
              MR. MURNANE:
10
11
12
13
14
15
16
              THE COURT: Now, is this -- is this comment
17
    box the back and forth between prior counsel for Sun
18
    and you --
19
              MR. MURNANE: Yes.
20
              THE COURT: -- in drafting the --
21
              MR. MURNANE: Yes.
22
              THE COURT: --
23
              MR. MURNANE: Yes, Your Honor. Addressing
24
    the very concern -- the very concern -- and you'll
25
    see in the box --
```

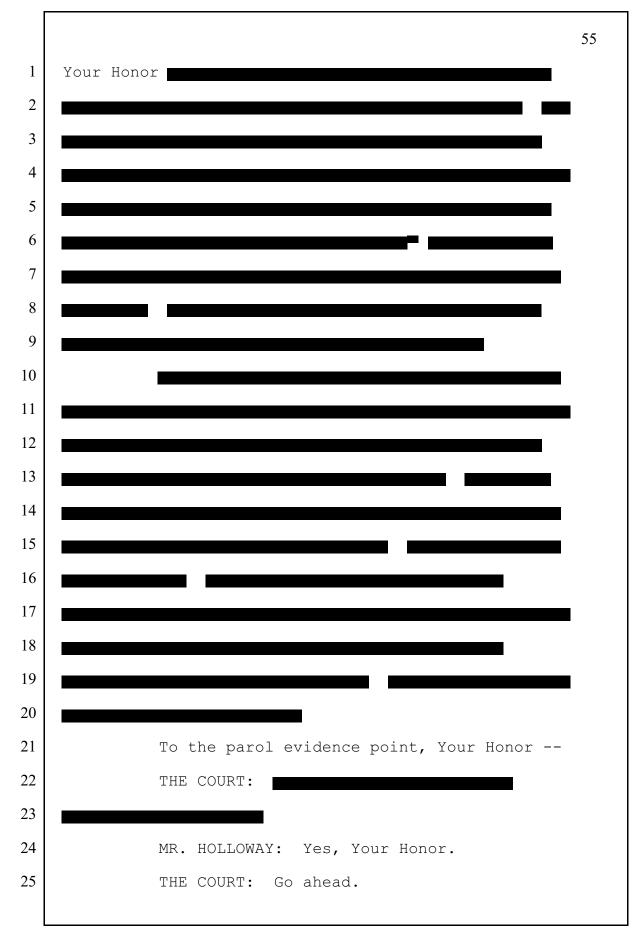
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50
1
              THE COURT: It feels like a parol evidence
2
    rule, but maybe not.
3
              MR. MURNANE: Right.
4
              THE COURT: But go ahead.
5
              MR. MURNANE: Well, and on that point, if
6
    I may, Your Honor --
7
              THE COURT: Well, finish your point --
8
              MR. MURNANE: Okay. All right.
9
              THE COURT: -- because we're already
10
    talking about it.
11
             MR. MURNANE: Okay.
12
              THE COURT: So go ahead.
13
              MR. MURNANE: So here, predecessor counsel
14
15
16
17
18
         exactly what Your
19
    Honor was talking about.
20
              THE COURT: Yes.
             MR. MURNANE: That's what they -- that's
21
22
    what
23
    The next slide 20 --
24
              THE COURT: Yes, but their counsel
25
    expressed
                                                 It's
```

```
51
1
2
              MR. MURNANE: Well --
3
               THE COURT:
4
5
              MR. MURNANE: Yeah, but he's saying is the
6
    same point.
7
8
               THE COURT: Right. So how does that
    advance your point? I'm not following.
9
10
               MR. MURNANE: My point is, Your Honor, that
11
12
13
14
15
16
17
18
19
20
21
22
    else has interpreted this agreement -- and Judge
23
    Stark, if I may, Your Honor, on pages --
               THE COURT: I missed that point.
24
25
```

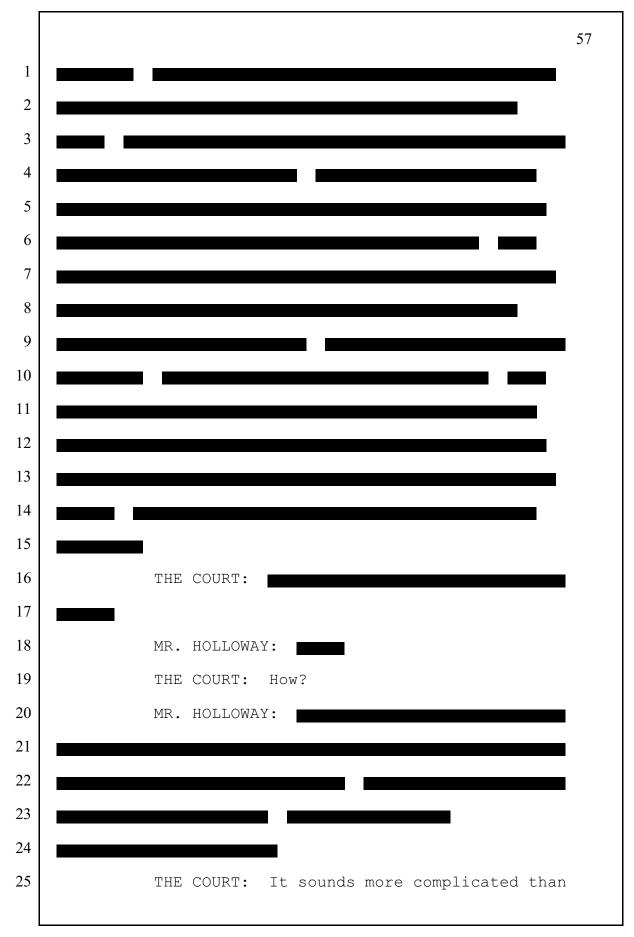


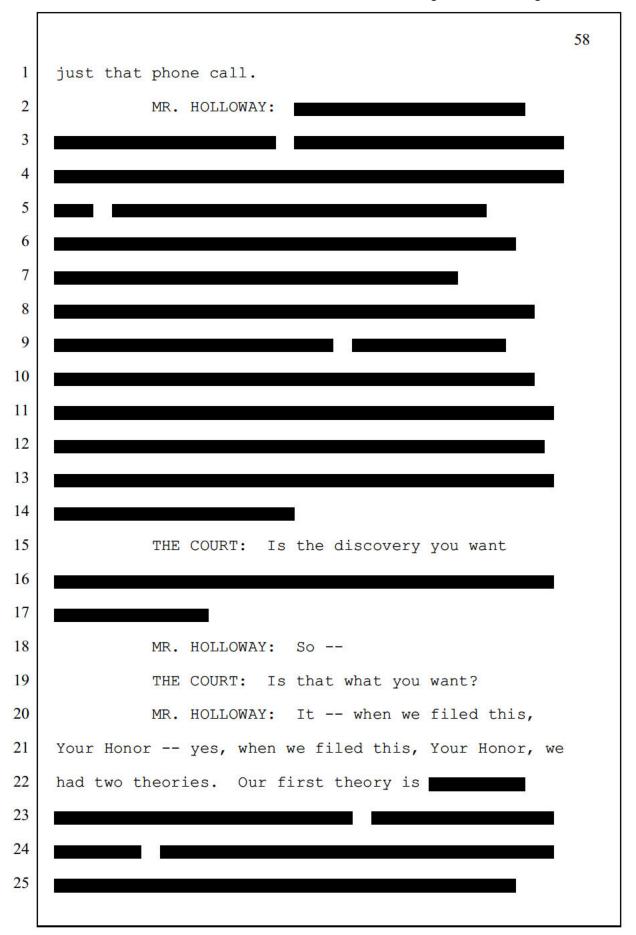
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53
1
              MR. HOLLOWAY: If I may, Your Honor? I
2
    want to start with that last point.
3
4
5
              THE COURT: Is the Judge Stark --
6
              MR. HOLLOWAY: Amgen breached the --
7
              THE COURT: -- case an antitrust case?
8
              MR. HOLLOWAY: Say it again.
9
              THE COURT: Is the Judge Stark cause-of-
10
    action case that we're talking about, isn't it an
11
    antitrust case?
12
              MR. HOLLOWAY: I'll let counsel for Amgen
13
    try --
14
              THE COURT: Is --
15
              MR. HOLLOWAY: -- to describe that.
16
              MR. MURNANE: That was -- that was
17
    initially brought as an antitrust case and patent
18
    misuse case, and --
19
              THE COURT: Right.
20
              MR. MURNANE: -- Judge Stark ultimately
21
    ruled based on
22
23
24
25
```

```
54
1
              THE COURT: With --
2
              MR. MURNANE: It was --
3
              THE COURT: Settlement agreement with?
              MR. MURNANE: Amgen.
4
5
              THE COURT: And?
6
              MR. MURNANE: Sipla.
7
              THE COURT: Similar to this?
8
              MR. MURNANE: Yes.
9
              THE COURT: Verbatim like this?
10
              MR. MURNANE:
11
12
              THE COURT:
13
              MR. MURNANE:
14
              THE COURT: So you're encouraging me to
15
    read carefully -- I've scanned -- read carefully
16
    Judge Stark's opinion because it interprets -- excuse
17
    me --
18
              MR. MURNANE:
19
20
              THE COURT: Okay.
21
              MR. MURNANE: With respect to the
22
              Your Honor.
23
              THE COURT: Yes, okay. All right, go
24
    ahead.
25
              MR. HOLLOWAY: The -- I would agree with
```



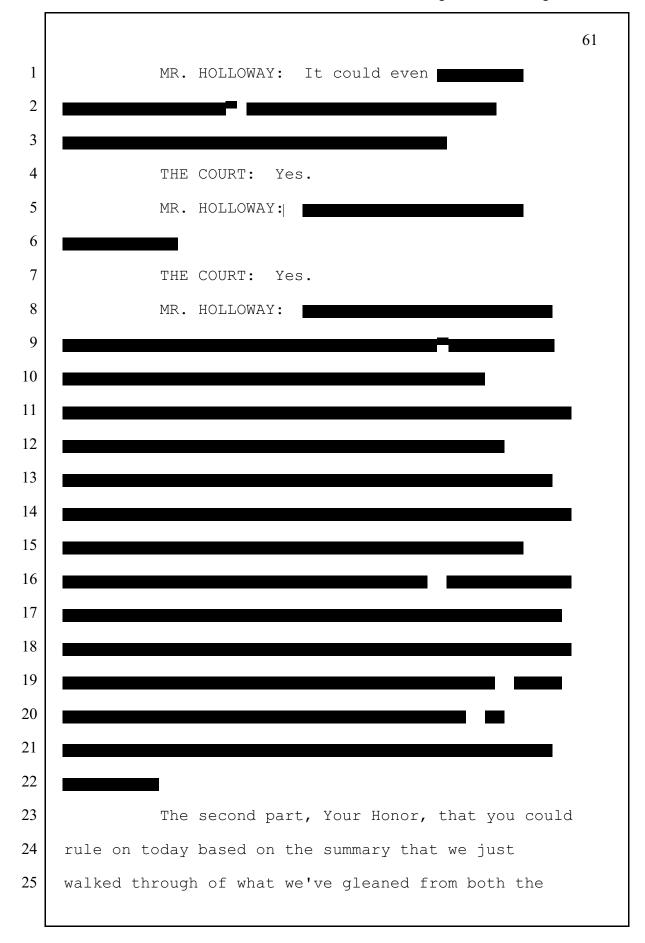
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56
1
               MR. HOLLOWAY:
2
3
               THE COURT: Go ahead.
4
               MR. HOLLOWAY: -- be specific.
5
               THE COURT: Yes. Yes.
6
               MR. HOLLOWAY: To the parol evidence point
7
    that we've walked through, Sun didn't bring up the
8
    parol evidence in this case. Amgen did on response.
9
    The reason we addressed it in our reply is because
10
    they mischaracterized it, just as counsel just did.
11
12
13
14
15
16
17
18
19
20
21
22
               Counsel for Amgen says
23
24
25
```



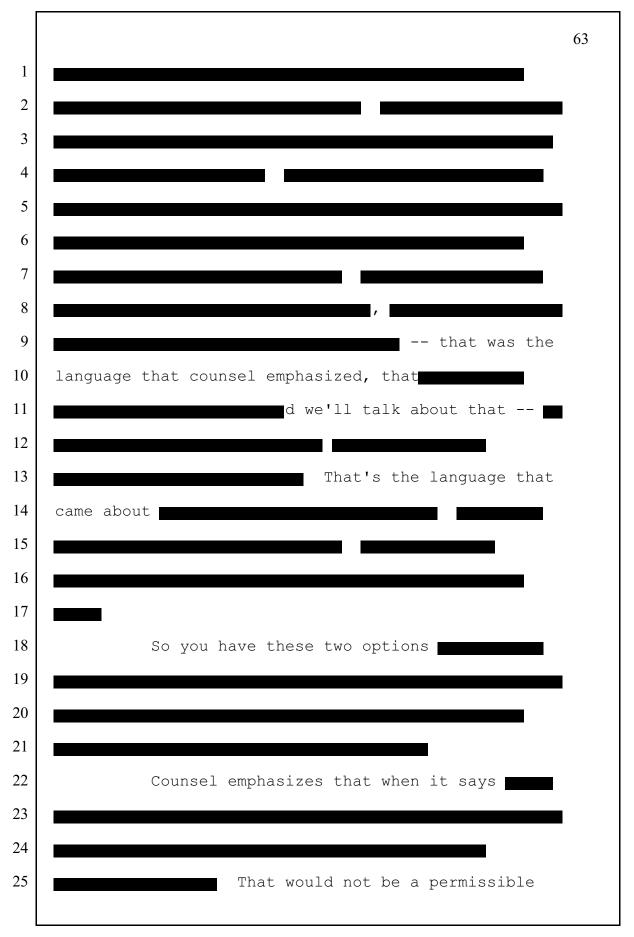


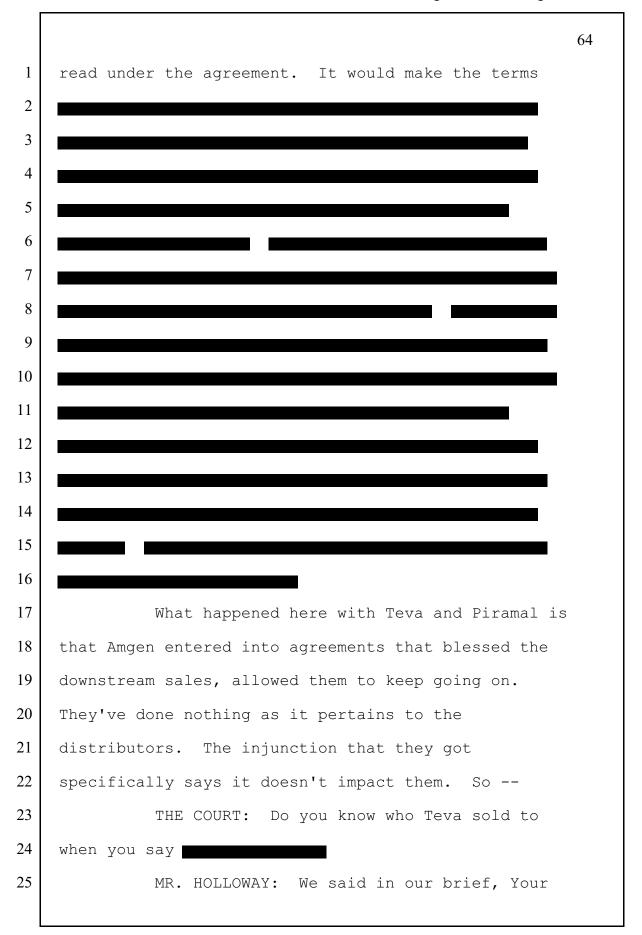
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59
1
2
3
             We also know that because in the
4
    injunction -- agreed-to injunction with Piramal,
5
6
7
8
9
10
11
              The other aspect of discovery that we
12
    originally requested and served on Amgen
13
14
15
16
17
              THE COURT: What does that have to do with
18
    my interpretation of the
19
              MR. HOLLOWAY:
20
21
22
              THE COURT:
23
                                               I thought
24
    you -- it's pretty simple.
25
              MR. HOLLOWAY: Sure.
```

```
60
1
              THE COURT:
2
                 I thought that was your -- that was
3
    your position.
4
              MR. HOLLOWAY:
5
6
7
8
                                                     Ι
9
    don't know what their conversations were.
10
              THE COURT: Right.
11
              MR. HOLLOWAY:
12
13
             Our position in our briefing has
14
    always been that is one thing, but we don't have the
15
    discovery on that to make that allegation. We think
16
    we've pled enough to get the discovery into that.
17
    What Your Honor could rule on today --
18
              THE COURT: I'm sorry to interrupt you.
19
              MR. HOLLOWAY: Uh-huh.
20
              THE COURT: What -- in this business, what
21
    would --
22
23
24
              MR. HOLLOWAY: It could --
25
              THE COURT: -- that says --
```



```
62
1
    Sipla order --
2
              THE COURT: I'm not ruling on anything
3
    today.
4
              MR. HOLLOWAY: I'm just saying --
5
              THE COURT: You didn't mean that literally,
6
    but --
7
              MR. HOLLOWAY: Not needing discovery.
8
              THE COURT: Right.
9
              MR. HOLLOWAY: That's what I was meaning.
10
              THE COURT: Right. Okay.
11
              MR. HOLLOWAY: Without needing further
12
    discovery,
13
14
              THE COURT: Right.
15
              MR. HOLLOWAY: And just to -- just to
16
    continue
17
18
19
       at my slide 11, I kind of break this down.
20
21
22
23
24
25
```



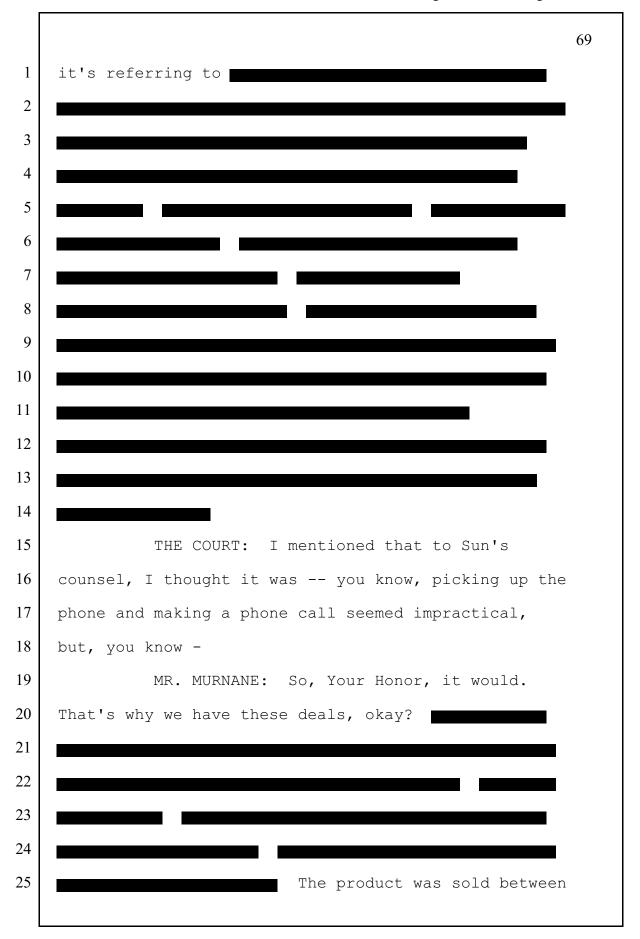


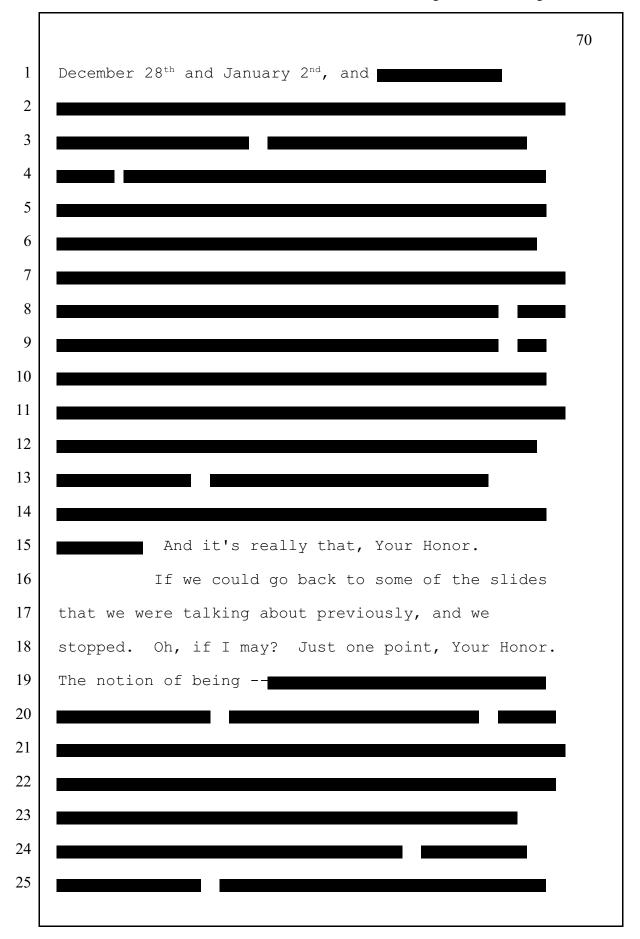
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65
1
    Honor, at page -- at page 3, we said
2
3
4
              THE COURT: What's that?
5
              MR. HOLLOWAY:
6
7
8
              THE COURT: Right.
9
              MR. HOLLOWAY:
10
11
12
13
              THE COURT: Right.
14
              MR. HOLLOWAY:
15
              THE COURT: Do you --
16
              MR. HOLLOWAY:
17
              THE COURT: Do you have any sense without
18
    having discovery of how much was sold
19
20
              MR. HOLLOWAY:
21
22
              THE COURT: Yes.
23
              MR. HOLLOWAY: That's why we said
24
          It was kind of --
25
              THE COURT: Do you --
```

```
66
1
              MR. HOLLOWAY: -- an information and
2
    belief.
3
              THE COURT: Do you have a questimate as to
4
    how much was sold (indiscernible)?
5
              MR. HOLLOWAY: It's actually described in
6
    pretty good detail in Judge Stark's Sipla order. It
7
    was estimated -- Teva estimated they were going to
8
    sell upwards of $212 million worth of product. As --
9
    Judge Stark notes at page 4 of the Sipla order that
10
    Teva launched by shipping 409,128 bottles to
11
    wholesalers. So --
12
              THE COURT: On the five quietest business
13
    days of the calendar year. I wonder if that -- I'm
14
    just curious --
15
              MR. HOLLOWAY: Yeah.
16
              THE COURT: -- whether that has anything to
17
    do with anything or it's just coincidence.
18
              MR. HOLLOWAY: Well, that's part of the
19
    allegation we made, Your Honor, is that even -- |
20
21
22
23
24
25
```

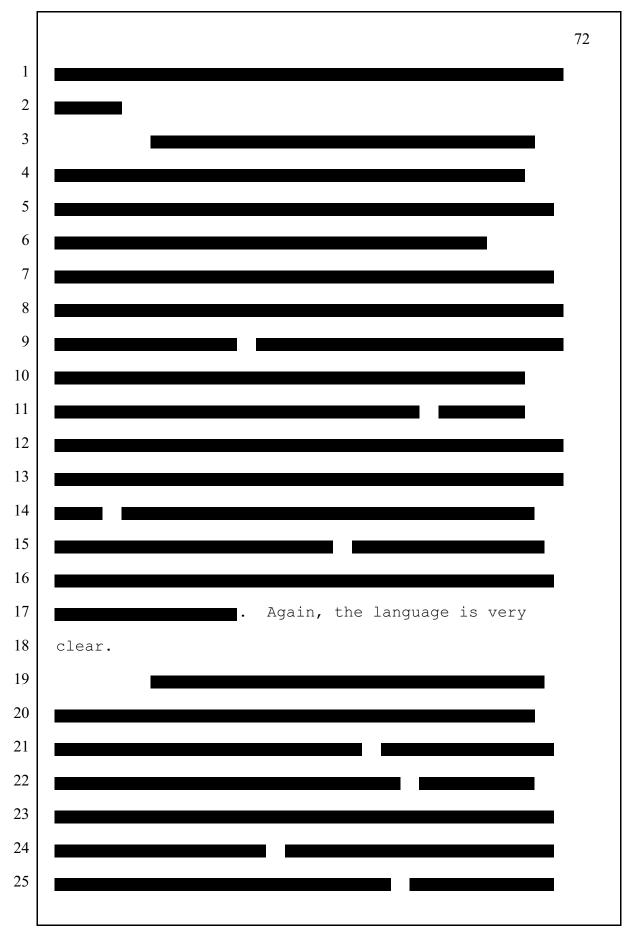
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67
    That's why it seems like there's -- you know, where
1
2
    there's smoke there might be fire, and that's why we
3
    made those allegations.
              THE COURT: Okay. I'm sure there's a lot,
4
5
    Mr. Murnane, so we'll give --
6
              MR. MURNANE: Yeah.
7
              THE COURT: -- Mr. Murnane the I think -- I
8
    think the last word. But let's see what he has to
9
    say. Maybe I'll let you respond. Go ahead, whatever
10
    you want to say in response to what counsel said.
11
              MR. MURNANE: Thank you, Your Honor.
12
              THE COURT: Sure.
13
              MR. MURNANE: With respect to Your Honor's
14
    comment on the time of year when this happened, the
15
    facts are the FDA approved Teva's ANDA on December
16
    27<sup>th</sup>, 2018.
17
              THE COURT: That's -- that was an aside
18
    comment --
19
              MR. MURNANE: Teva --
              THE COURT: -- I probably should have just
20
21
    kept to myself.
22
              MR. MURNANE: Well, just to let Your Honor
23
    know --
24
              THE COURT: Yes.
25
              MR. MURNANE: Well, Your Honor made a side
```

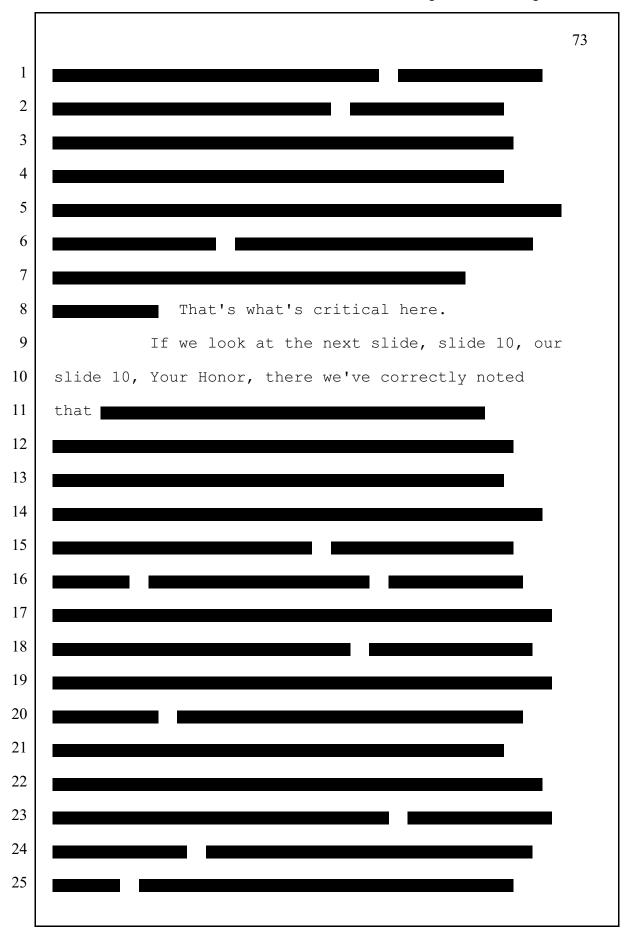
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68
1
    comment. Opposing counsel made more than a side
2
    comment, okay? So Teva --
3
               THE COURT: I don't see how it's going to
    factor into my decision.
4
5
              MR. MURNANE: Teva launched the next day
6
    and there was the settlement.
7
8
9
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25
               Again, if we look at the slide 16 where
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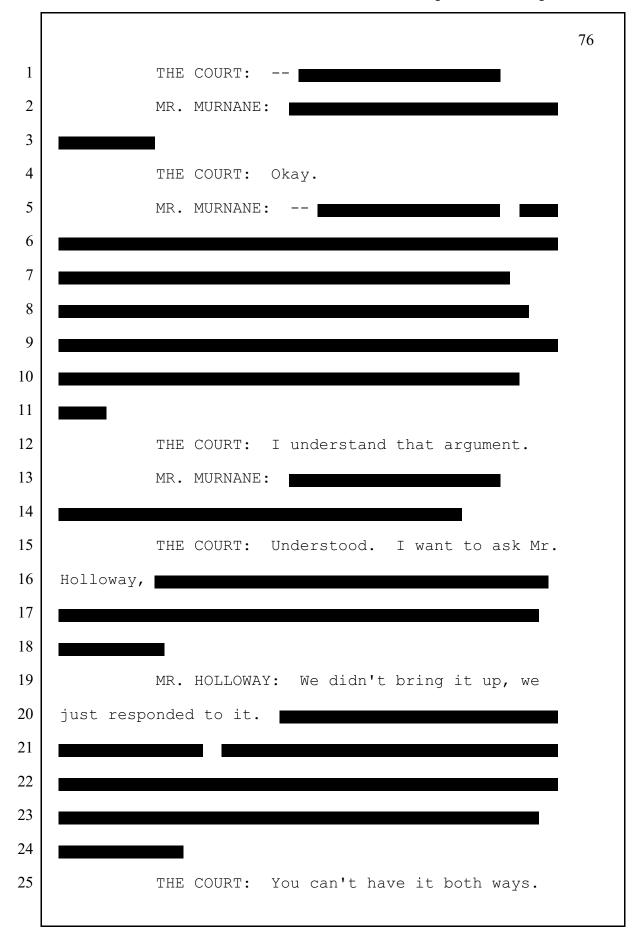
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71
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5
              THE COURT: Could you -- could you bear
6
    with me one second? I want to --
7
              MR. MURNANE: Sure.
8
              THE COURT:
9
10
              MR. MURNANE: Uh-huh.
11
              THE COURT: Just give me one second.
12
               (Pause in proceedings.)
13
              THE COURT: Go ahead.
14
              MR. MURNANE: Okay. If I -- if I may
15
    invite attention back to -- I'm just responding to
16
    comments that counsel made, Your Honor --
17
              THE COURT: Yes.
18
              MR. MURNANE: -- back to slide -- our slide
19
    16 -- 16 and 17. Counsel focused on
20
21
22
23
24
25
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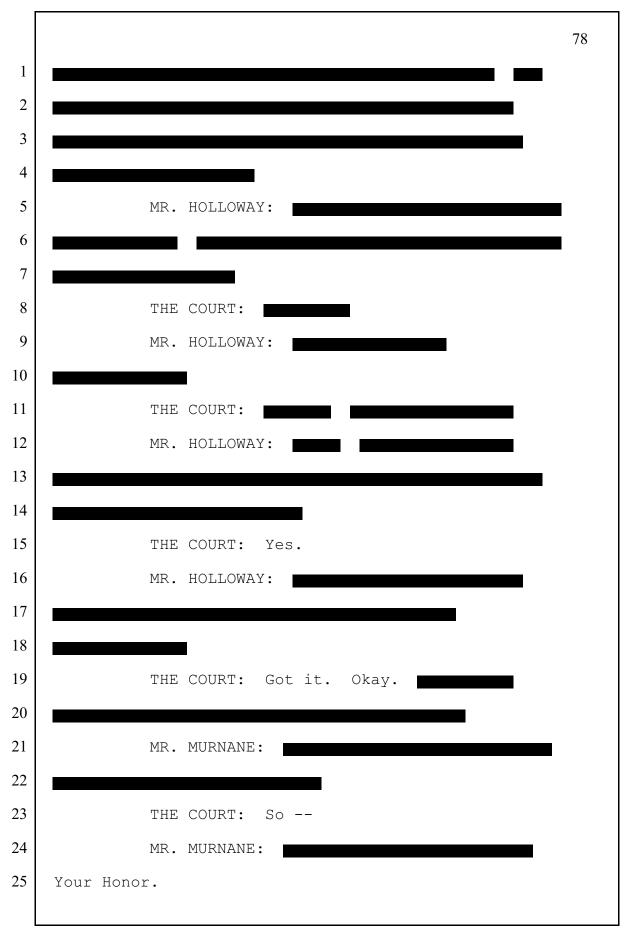


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74
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5
               THE COURT: So what did -- to general --
6
    sort of step back from all these details questions,
7
8
9
10
11
               MR. MURNANE:
                             Right.
12
               THE COURT:
13
               MR. MURNANE:
14
15
16
               THE COURT:
                           In
17
               MR. MURNANE:
18
               THE COURT: -- right?
19
               MR. MURNANE: I think
20
               THE COURT:
21
                                            That's --
22
               MR. MURNANE: That's what they've bargained
23
    for, Your Honor.
24
               THE COURT: That's a long time, right?
25
               MR. MURNANE: Well, that's what they --
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75
1
    that's what they bargained for.
2
              THE COURT: Okay.
3
              MR. MURNANE: Or --
4
              THE COURT: Or --
5
              MR. MURNANE: -- if
6
              THE COURT: Right.
7
              MR. MURNANE: -- under ■ --
8
              THE COURT: Okay.
9
              MR. MURNANE:
10
11
12
              THE COURT: Right.
13
              MR. MURNANE:
14
              THE COURT: Which is what this discussion
15
    has been about, so --
16
              MR. MURNANE: Exactly.
17
              THE COURT: -- I'm still sort of wondering
18
    why this was a -- maybe this is something I shouldn't
19
    be thinking about, but I'm sort of wondering ▮
20
21
              MR. MURNANE: What --
22
              THE COURT: They -- you're -- if I accept
23
    what you're saying,
24
25
              MR. MURNANE: Or --
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77
1
              MR. HOLLOWAY: But --
2
              THE COURT: You can't say don't consider
3
4
5
              MR. HOLLOWAY: Yeah, I don't --
6
7
8
9
              THE COURT: Okay.
10
              MR. HOLLOWAY:
11
12
              THE COURT: Understood.
13
              MR. HOLLOWAY: -- of it, Your Honor.
14
              THE COURT: Okay. Excuse me one second.
15
              (Pause in proceedings.)
16
              THE COURT: Okay. Good discussion. I'll
17
    let both counsel summarize if you think it's
18
    necessary. I think we really covered a lot of
19
    ground, but if there's another point that you believe
20
    hasn't been made because we've had a -- sort of a Q
21
    and A, I'll listen to any further points you want to
22
    make.
23
              I have one final question.
24
25
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1
              THE COURT: Yes.
2
              MR. MURNANE:
3
              THE COURT: Yes.
4
              MR. MURNANE:
5
6
7
8
9
10
               THE COURT:
11
12
              MR. MURNANE:
13
14
              THE COURT: Okay.
15
              MR. MURNANE:
16
17
              THE COURT: Okay. Mr. Holloway, any final
18
    points you think you haven't made that you want to
19
    make?
20
              MR. HOLLOWAY: I made it just then, Your
21
    Honor.
22
               THE COURT: All of the above, everything
23
    we've been talking about.
24
              MR. HOLLOWAY: Yeah, that's it.
25
              THE COURT: Okay. You're good? Okay. Mr.
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80
1
    Murnane, anything else you want to -- you want to
2
    say?
3
              MR. MURNANE: If I may just address
4
5
              THE COURT: Sure.
6
              MR. MURNANE: -- point that --
7
              THE COURT: Go ahead.
8
              MR. MURNANE: -- counsel made?
9
              THE COURT: Yes.
10
              MR. MURNANE: Your Honor,
11
12
13
14
15
16
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18
19
20
    there's -- if Your Honor believes
21
                       In this case,
22
23
24
25
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81
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3
               THE COURT: Okay. All right, thank you to
4
    both counsel. Would you submit a proposed sealing
5
    draft order?
6
              MR. HOLLOWAY: Yes, Your Honor.
7
               THE COURT: I think I've articulated the
8
    reasons and we'll see -- we'll see how that goes.
9
    Okay. Thank you, everybody. Good afternoon.
10
              MR. MURNANE: Thank you, Your Honor, and
11
    good afternoon.
12
               (Proceedings adjourned, 3:30 p.m.)
13
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6	CERTIFICATION
7	
8	I, Michael Keating, do hereby certify that
9	the foregoing is a true and correct transcript from the
10	electronic sound recordings of the proceedings in the
11	above-captioned matter.
12	
13	
14	Muha II. Leating
15	
16	Date Michael Keating
17 18	
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